instruction sheet which had been utilized in previous elections. The most significant factor to be considered by this Court in reviewing the record in this case is that the arrangement on the voting machine upon which the hypothetical questions were based *was not* the arrangement on the face of the machines actually used in the election. The final arrangement, which is shown in Appellants' Appendix A, p. 36, was radically different. Because the sample ballot shown in Appellants' Appendix is a rough diagram of the final ballot, Appellees have added as Appendix A to this brief a copy of the ballot as it appeared in the voting machines on November 4, 1969. Moreover, the voting instructions comprehended in the hypothetical questions were also radically changed and totally different ones were used in the actual election (see Appellants' Appendix A, pp. 26-27).

On the ballot arrangement which actually appeared on the voting machine in the election, Appellant Gilhool, who filed under the political body name "Urban Action Party," was given a straight party lever in Column G[3] (see

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3. Under the initial ballot arrangement contemplated at the time of the preliminary injunction hearing, Gilhool was arrayed vertically in a column on the right hand side of the machine along with the other "independent" candidates for the councilmanic vacancy. This occurred because at that time there were more "independent" candidates for the First District Councilmanic seat than could be arrayed in separate columns on the Shoup voting machines in use in that district. In that situation the Election Code, 25 Purdon's Stat. Ann. §3010 (h) provides:

> "The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a separate row or column and a straight party lever, but shall be listed by political appellations on the

Appellants' Appendix A, p. 36 and Appellees' Appendix A). Therefore, it was possible for a voter to vote for Appellant Gilhool by pulling the straight Urban Action lever in the same manner that a voter could have voted for a Republican or Democratic candidate for the office. The record is undisputed that one could have voted for Appellant Gilhool on November 4, 1969 in the same number of ways and in the same manner as one could have voted for the Republican or Democratic candidates (see Opinion of the Court below, Appellants' Appendix A, p. 29).[4]

With one exception, Appellants' own witnesses conceded (see e.g. N.T. 90-94) that Gilhool was treated in the same manner on the voting machine as the Republican and Democratic candidates were. The exception turns on the fact that there was a "gap" between the major party columns and the Urban Action column. This was the result of the failure of the Constitutional and American Independent Parties, the two parties whose columns separate the two major parties on the left of the ballot from the

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first left hand or top row with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column."

However, a number of the candidates were stricken from the ballot by Common Pleas Court because their nomination papers were found to be defective. There then was sufficient room on the machine, and Gilhool was given a separate column and party lever. It should be noted that even had the initial ballot arrangement prevailed, Appellees would have maintained and could have clearly demonstrated that the "independent" candidates were not discriminated against. They would have been fully protected by options available on the Shoup voting machines, but it is unnecessary to discuss that point in view of the striking of the excess candidates from the ballot.

4. This is confirmed by a review of the revised voting instructions (see Appellants' Appendix A, p. 36) which explains the mechanics of voting machine voting in Pennsylvania.

independent political bodies[5] on the right of the ballot, to run candidates for the office of Councilman in the First District.

The second hearing produced nothing but: (1) the submission of the final ballot arrangement and the revised voter instructions as to operation of the machines discussed above; and (2) an attempt to introduce into evidence certain studies of voter habits which were intended to support Appellants' theory that the use of a party lever causes a voter shift. While Appellants had objected to the first set of voter instructions as being disciminatory, no objection was lodged against the final set of instructions.

In its Opinion, which followed on October 14, 1969, the Court found that Appellants had failed to meet their burden of proving that the mere presence of party levers would cause voters who would otherwise vote for independent candidates to shift their votes to candidates of the major political parties. The Court ruled that the studies of voter habits were inadmissible.

In its opinion, the Court also rejected the argument that "the spatial gap" discriminated against independent candidates on the ground that there was no evidence as to the extent and magnitude of the alleged discrimination. Mindful of the fact that not every party can be first on the ballot in any situation, the Court held that the statute reasonably and fairly arranged parties on the ballot and could

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5. Under the Pennsylvania Election Code a distinction is made between Political Parties and Political Bodies. 25 Purdon's Penna. Stat. Ann. Sec. 2831. A Statewide Political Party is one whose candidate(s) polled at least 2% of the Statewide vote (and also 2% of the vote in any 10 counties) for any given office in the preceding general election. A Countywide Political Party is one whose candidate(s) has polled 5% of the Countywide vote for any office in the preceding general election. A Political *Body*, such as the Urban Action Party formed by Appellant Gilhool, can acquire a position on the ballot merely by obtaining signatures of one-half of one percent statewide, and two percent countywide of the largest entire vote cast for any elected candidate at the previous election in the applicable electoral district. 25 Purdon's Pa. Stat. Ann. Sec. 2911.

not be considered unconstitutional merely because of the coincidence that two parties did not run any candidates. (See Appellants' Appendix A, p. 33).

Having concluded that Appellants had failed to sustain their burden of proving that the use of party levers in the election in question attained the dimension of invidious discrimination proscribed by the Federal Constitution, and therefore that Appellants were not entitled to preliminary injunctive relief directed towards the November 4, 1969 Election, the Court proceeded to dismiss the Appellants' claim for permanent injunctive relief. In this regard it should be noted that: (1) by that time the election was imminent; (2) no request had ever been made by Appellants to have the testimony on the record treated as on final hearing or to advance the trial on the merits and consolidate it with the hearing on the application for preliminary injunction, and (3) Appellants' Complaint was directed only to the November 4, 1969 Election. The request for a full trial on the merits as they are now advanced, i.e. on the constitutionality of Pennsylvania straight party lever voting as an abstract question (as opposed to the constitutionality of the ballot arrangement for the November 4, 1969 Election), came for the first time in Appellants' Jurisdictional Statement accompanying this Appeal.

ARGUMENT

I. THE CASE IS MOOT.

Anticipating that Appellees would argue that the case is moot, Appellants contended in their Jurisdictional Statement that this case is on all fours with *Moore v. Ogilvie*, 394 U.S. 814, (1969), because the challenged practice under State law was "capable of repetition, yet evading review." Appellants argued further that all independent candidates and their supporters will continue to be affected

at every future election so long as the Pennsylvania Election Code continues to require straight party levers. In this analysis, however, Appellants have themselves evaded reviewing the following salient factors in the case, which bear on the question of mootness:

1. It is impossible to measure the effect of the straight party lever in the abstract, i.e. without reference to a particular ballot arrangement. We have no idea of what the ballot arrangement in future Presidential, Gubernatorial, Mayoralty, Congressional Elections, etc., will be. It is submitted that a ballot arrangement problem similar to the one involved in the present case is unlikely to arise again.[6]

2. The within Complaint focuses solely upon the November 1969 Election and makes no request for continuing relief. It does not allege that Appellants Gilhool or Hackett will ever again be candidates or that Appellants who are denominated simply as voters will ever again choose to vote for them or for any independent candidate similarly situated. Neither is there any evidentiary proof in the record as to any of these items. *Golden v. Zwickler*, 394 U.S. 103 (1969), holds that where there is no substantial continuing controversy between parties having adverse legal interests, the case is moot. See also *Brockington v. Rhodes*, 396 U.S. 41 (1969). *Hall v. Beals*, 396 U.S. 45 (1969), emphasized the futility of the Court's deciding cases where its mandate can have no practical or realistic effect upon the rights asserted by the particular parties in the suit. Since the instant Complaint alleges no injury to any of the Appellants that continued beyond November 4, 1969, the case is like *Hall v. Beals*, supra, which held that Appellants cannot represent a class of which they are not members.

6. There is no certainty that in the foreseeable future the voting machines will not be able to accommodate all independent political bodies with a separate straight party lever, as in the instant case. Likelihood that a situation will recur was held to be important in *Golden v. Zwickler*, 394 U. S. 103 (1969).

3. The within action does not seek declaratory relief and is distinguishable from *Moore v. Ogilvie*, supra, on this additional ground. Even declaratory relief is not available for it is unlikely that an actual controversy between the parties would ever arise again. *Golden v. Zwickler*, supra.

When these factors are considered, the mootness argument must, it is submitted, be sustained.

II. A THREE-JUDGE COURT SHOULD NOT HAVE BEEN CONVENED BECAUSE THE FILLING OF VACANCIES UNDER A LOCAL HOME RULE CHARTER IS NOT A STATEWIDE ISSUE.

The question of filling vacancies in councilmanic offices is covered by section 2-101 of the Philadelphia Home Rule Charter. That section provides for the calling of a special election to fill the vacancies for the balance of the unexpired term. The City could have provided in its Charter for the filling of vacancies by a variety of means, including a special election, but the fact that the City Home Rule Charter in effect incorporates by reference the provisions of statewide legislation (the Pennsylvania Election Code) does not mean that the conduct of that election is a statewide issue. The relief and the determination sought by the complaint is only with respect to the two councilmanic elections.

It is basic that a three-judge Court should not be convened except where the issue involved is truly statewide in its scope. As was stated in *Moody v. Flowers*, 387 U. S. 97 (1967):

> "The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (Ex parte Collins, supra; Rorick v. Board of Commissioners, supra) unless he is functioning pursuant to a statewide policy and performing a state function.

> Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 55 S. Ct. 678, 79 L.Ed. 1322. Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. Rorick v. Board of Commissioners, supra."

A comparison of *Moody v. Flowers*, *supra*, and *Dusch v. Davis*, 387 U.S. 112 (1967), where three-judge Courts were held to have been improperly convened, with *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967), where the three-judge Court was held to have been proper, indicates that the Court below should have denied relief ab initio.

This issue was raised below by intervenor Democratic County Executive Committee in its Memorandum of Law Contra Motion for Preliminary Injunction. In any event, the propriety of convening a three-judge Court and, therefore, the validity of the jurisdiction of this Court, can be raised in this Court even if never raised below. *U.S. v. Griffin*, 303 U.S. 226 (1937). The question may even be raised by the Court on its own motion. *Stratton v. St. Louis Southwestern R. Co.*, 282 U.S. 101 (1930).

III. THE QUESTIONS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

As we have seen in the Statement of the Case, Appellant Gilhool was afforded the benefit of a straight party lever, to the same extent as the Republican and Democratic candidates. But he nonetheless persists in arguing a case which is different from that in the record. The case which he argues is that, in the abstract, the straight party lever discriminates against independent candidates who have no straight party lever. And he argues it, not on the basis of evidence before the Court, but on the basis of

political science treatises and articles not before the Court.[7]

Appellees submit that the Court below was correct in concluding that these studies were not properly before it as they were not identified by any witnesses as standard reference works, and none of the court "experts" who testified[8] commented as to the specific studies either as to the authors' methodology or the accuracy of their results. The Court below was also correct in concluding that the studies do not support Appellants' claim. (See Appellants' Appendix A, p. 28).

Appellees find the analysis of the Court below as to the value of these studies to be persuasive. In addition to the factors mentioned in the Court's opinion, the following matters relating to data and methodology support the Court's decision to exclude the studies:

1. The studies are not directed towards the question at issue in this case.

2. The studies do not report data from Pennsylvania whose Election Code is under attack herein, or from states whose voting machines are demonstrated to be arranged like those in Pennsylvania.

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7. Walker, "Ballot Forms and Voter Fatigue: An Analysis of Office Block and Party Column Ballots", 10 *Midwest Journal of Political Science* 448 (1966), Campbell & Miller, "The Motivational Basis of Straight and Split Ticket Voting", 51 *American Political Science Review* 292 (1957), Campbell, Converse, Miller & Stokes, *The American Voter* (1960), and Key, *Politics, Parties and Pressure Groups* (5th ed. 1964).

8. As has been set forth in the Statement of the Case, the "expert testimony" adduced at the first hearing did not refer to the ballot arrangement actually used in the election. Moreover, it was possible to vote for Appellant Gilhool in as many ways and in the same way as one could have voted for the major party candidates. It would be repetitive to reanalyze those aspects of the matter here. However, the fact that Appellant failed to establish discrimination by any *direct testimony* adds to the force of Appellees' argument.

3. *Campbell and Miller*, the principal study dealing with voter motivation, give so many rationales for the voting of straight and split tickets that it is impossible to draw any firm conclusion from its data. Moreover, virtually all of the data in the studies cited by Appellants comes from Presidential elections (principally the 1956 Eisenhower-Stevenson Presidential Election) where the issues are very different from those involved in the local election now before the Court.

Turning, however, from methodology to substance, Appellants, both in the text of their jurisdictional statement and in the text of the studies upon which they reply, set forth important justification for the utilization of the straight party lever. This becomes important to the case because it is basic to this area of the law that if there is reasonable justification for the State's action, it will be sustained under the Equal Protection Clause. The applicable law will be discussed at length below. However, Appellees will take the opportunity, at this point in the brief, to discuss the substantive question of whether the straight party lever is justifiable in fact, commenting first upon the reasons given by Appellants and the studies which they cite, followed by Appellees' additional analysis.

First of all, the Walker study concludes that the so-called office block ballot, which is the principal way of arranging the ballot when the party lever is removed, increases voter fatigue and vote "roll-off". This means that when poorly educated, badly informed voters are encouraged to split their tickets, the greater is their tendency to neglect contests at the bottom of the ticket. This would include contests such as the one in question for City Council. Such "roll-off" clearly dilutes these voters' electoral weight.

Secondly, *Campbell and Miller* explain that there are huge masses of voters whom they variously describe as "highly politically motivated voters" or "party oriented voters" who intellectually and philosophically prefer the

straight party lever because it gives the fullest effect to their political will and recognizes the historical importance of political parties.

Conversely, it may clearly be inferred from the Campbell and Miller study that it is easier for voters using the office ballot arrangement (which is generally the reverse of the party column arrangement) to vote on a purely ethnic or on a frivolous basis. It is plain that voters often do so, and the party lever is valuable in discouraging it.

Appellants have given important justification for the party lever even in their own Complaint (see paragraph 18), and in their Jurisdictional Statement in this Court (see page 17). In these documents, Appellants point out that in many elections there is a strong and perhaps compelling state interest on the side of favoring party candidates for lower offices in the manner allegedly achieved by party levers in Pennsylvania. That situation, they contend, is where the election involved the choice of the full "team" of elected officials to govern a political unit such as a governor and members of the legislature, mayor and city council, etc. Appellants are correct as to this very important point, although they have failed to grasp its applicability to the present case where three important municipal offices were on the ballot—District Attorney, City Controller and Councilmen, who indeed formed a "team." The concept is, of course, present in even greater measure in the November elections of the other three years of a four-year cycle where, in Philadelphia at least, the voters are called upon to vote for a governor and General Assembly (1970), for a Mayor, "row offices" and City Council (1971), and for President and Congress (1972).

Appellees agree that the straight party lever does indeed permit a voter to give expression to his particular political philosophy by supporting the full slate of the party of his choice. Appellees submit that in some measure this adds to the stability of the American political system. It does not limit that system to two parties because it is

easy, in Pennsylvania at least, for other parties to get on the ballot and obtain their own straight party lever (as the Urban Action party did). By permitting a voter to express his political philosophy and vote for a team by pulling the straight party lever, the state fosters a legitimate interest. Appellees submit that if Appellants are suggesting that the equal protection clause must be infused with the policy that it is more desirable to emphasize the role of individual candidates than the role of the party, hence invalidating the party lever, then Appellants are seeking to lead this Court into the realm of a political judgment which indeed would be non-justiciable notwithstanding the line of cases following *Baker v. Carr*, 309 U.S. 186 (1962).

There is another equally important role of the party lever—it provides an effective mechanical means of speeding up the voting process. This is a tremendously important factor in congested urban areas where the bulk of the voters come to the polls after work, and where the polls close at 8:00 p.m. Were it not for the use of voting machines containing party levers which speeds up the voting process, such long lines would accumulate at polling places in the cities that numerous voters would be discouraged from exercising their franchise at all because of the delay.

Having argued at length there is a legitimate state interest in providing a straight party lever—for all parties and political bodies—as part of its election machinery, Appellees hasten to add the obvious: that it is not its burden to do so, but rather Appellants' burden to prove invidious discrimination. But as has been pointed out above, the record in this case and in Appellants' studies is totally inconclusive as to the effect of the straight party lever on the voter. It is submitted that that effect depends upon a myriad of variables. These include the nature of the election, the issues involved, the identity of the candidates, and the education, experience, and philosophy of the voter. To state a tautology, these variables are and never will be,

constant. The fact is that the total milieu varies from election to election, and Appellees wonder indeed whether all of the in-depth psychological studies in the world could ever establish Appellants' point.

Hence the record up until now does not demonstrate that the state has injected a bias into the election procedure. The vastly increased incidence of split ticket voting (and the data from the Eisenhower-Stevenson Election of 1956 cited by Campbell and Miller is a case in point) inveighs against Appellants' argument that the party lever inhibits independent voting. If there is an incidental benefit to a political party or to the fulfillment of the rights of the elector to make a choice by party based on party principle rather than on individuals whom he may or may not know, this is nothing more than a recognition of the importance of political parties in our American way of life and does not constitute any capricious or invidious debasement of the right to vote.

For the Court to declare straight party lever voting unconstitutional would have enormous and far-reaching consequences. Appellees have surveyed the voting laws of the fifty states of the Union and have determined that there are at least twenty-seven states which permit straight ticket voting.[9] Accordingly, it is submitted that this Court should not lightly embark upon that course, especially in light of the meager record in this case.

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9. According to Appellees' research, (and see Congressional Quarterly, July 1963) the states which permit straight ticket voting are Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin. Citations of the applicable election laws of the states are contained in Appendix B to this Brief. Of course, not all of the states use voting machines, and in the states where they are used they are not used in all areas (See Appendix C to this brief). But it is possible to vote a straight party lever on a paper ballot by marking the appropriate box with an X, and so a determination in this case might affect paper ballot voting as well.

The issue involved is not new to this Court. It was dealt with in the case of *Voorhes v. Dempsey*, 231 F. Supp. 975 (D. Conn. 1964), Aff'd 379 U.S. 648. That case involved a Connecticut mandatory party lever where the machines were so arranged that it was necessary to pull a party lever to unlock the machine in order to vote. In Pennsylvania one can activate the machine and then split the ticket without pulling the straight party lever. Hence, if the party lever were upheld in *Voorhes* it must, a fortiori, be upheld here. In *Voorhes*, the three-judge Court held that the Connecticut Statute did not deprive independent voters of any constitutional right, and this Court affirmed that decision. The three-judge Court stated:

> "Under the Federal Constitution the states have been entrusted with broad discretion in formulating an election system, *United States v. Classic*, 313 U.S. 299, 311 (1941), and nothing in the complaint indicates that this discretion has been abused. The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be termed fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to split ticket voters for the Connecticut statute would appear to be much less than the New Jersey statutes, sustained by a three judge court in *Voltaggio v. Caputo*, 210 F. Supp. 377 (D.C.N.J. 1962), denying an independent candidate the opportunity to have his name listed on the ballot with the top group of candidates. . . .

"The utilization of party levers, be they optional or mandatory, discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of votors . . . We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws." 231 F. Supp. at 975.

Appellees have reviewed the Jurisdictional Statement filed with this Court in the Voorhes case. In that statement, Voorhes averred that the following questions were presented (inter alia) by the Appeal: . . .

C. "Whether the mandatory party lever established by the Connecticut General Statutes denies the plaintiffs their right to free selection by placing upon them mental and psychological pressure to merely and solely pull a party lever

D. "Whether the mandatory party lever established by Sec. 9-242 of the Connecticut General Statutes subjects independent voters of said state to a more burdensome condition in casting their votes than the conditions to vote required of voters registered in a party.

E. "Whether the mandatory party lever established by the Connecticut General Statutes denies independent voters of said state equal protection of the law

F. "Whether the mandatory party lever is class legislation establishing a preferential group accorded privileges and immunities not granted to other voters."

It is submitted that a mere recitation of the foregoing establishes that the same issues as are involved herein were involved in *Voorhes*.

The principal thrust of Appellants' contention in this case is that this Court's affirmance of *Voorhes* should be ignored because it has been "undermined" by *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Moore v. Ogilvie*, supra. Appellees cannot agree with this contention, and neither did the Court below. As Judge Masterson pointed out, *Moore* voided an Illinois statute which made it impossible for the voters in forty-nine counties, representing 93.4 percent of the registered voters in the state, to form a new political party and place its candidates on the ballot. In *Williams* the Court found that Ohio's election laws were so laced with restrictions as to make it virtually impossible for any party other than the Republican and Democratic parties to qualify on the ballot. The facts of the case at bar are far, far different. Appellants had no difficulty in obtaining a place on the ballot under Pennsylvania law[10] and were afforded a straight party lever just as were the major parties. Moreover, it is even questionable as to whether *Williams* is an equal protection case in light of the concurring opinions of Justices Harlan and Douglas, and the dissenting opinions of Justices Stewart and White and Chief Justice Warren. *Moore* and *Williams* are so different on their facts that they cannot be construed to have "undermined" *Voorhes*.

Williams v. Rhodes does confirm the principle that a state may enact laws which reasonably regulate the electoral process. In two cases filed since, the Court has upheld state election laws which require independent candidates to obtain more signatures than party candidates in order to get on the ballot. *Lyons v. Daveren*, 402 F. 2d 890 (C.A. 1, 1969), cert den. 393 U.S. 108 (1969) and *Moskowitz v. Power*, (New York Court of Appeals, 1969) U.S. Supreme Court Oct. term 1969 No. 770 (Appeal Dismissed Jan. 20, 1970).

10. See footnote 4 to this Brief.

There have been many state cases sustaining the validity of straight party voting. The earliest is *Todd v. Board of Election Commissioners*, 104 Mich. 474, (1895), but Pennsylvania, whose law is under attack herein, soon followed with *Oughton v. Black*, 212 Pa. 1, 61 A. 346, (1905). There the Supreme Court of Pennsylvania had before it the constitutionality of straight party voting under the state statute. In that case independent candidates for office contended that giving to voters who wished to vote for all candidates of one political party the special privilege of doing so by a single cross-mark constituted an inequity and authorized a method of voting for political parties, not for men; and that such special privilege given to straight-ticket voters and denied to others, injured the plaintiffs, who, as candidates, were opposed by candidates who could be much more easily voted for.

That Court stated (212 Pa. at 6):

> "The free and equal exercise of the elective franchise by every elector is not impaired by the statute, but simply regulated. A regulation for the convenience of certain electors providing that they may,—not must,—if they desire to vote a straight party ticket, vote for it by marking a cross in the square opposite the name of the party of the their choice is not inequality as against these complainants. They have the right to vote in precisely the same way for all of the candidates on the Municipal League ticket."

More recent expressions of a similar view by the Pennsylvania Courts appear in *Davidowitz v. Philadelphia Co.*, 324 Pa. 17, 187 A. 583 (1936); and *Petition to Set Aside Special Election*, 15 D. & C. 2d 271 (1956).

To the same effect are *Morrison v. Lamarre*, 75 R.I. 176, 65 A. 2d 217 (1949); *Brock v. Helton*, 395 S.W. 2d 765 (Ct. of App. of Kentucky, 1965); *State v. Martin*, 24 Mont. 403, 62 Pac. 588 (1900); *State v. Wait*, 92 Neb. 313, 138 N.W. 159 (1912); *State v. Neffner*, 137 Ohio St. 309, 29 N.E. 2d 215 (1940); *State v. Grasso*, 27 Conn. Sup. 67, 229 A. 2d 703 (1966); Also see *Voltaggio v. Caputo*,

210 F. Supp. 377 (D. C. N.J.), app. den. 371 U.S. 232 (1963), and *Melchior v. Todman*, 296 F. Supp. 900 (D. C., Virgin Islands, D. St. Thomas and St. John, 1968), where Chief Circuit Judge Hastie assumed the validity of straight party voting.

The identical principle is involved whether the election is a regular election or a special election. In each case the election is for the purpose of filling an office. *Leon v. Philadelphia*, 9 D. & C. 2d 706 (1956); *Petition to Set Aside Special Election*, 15 D. & C. 2d 271 (1956).

The basic standard of constitutional adjudication under the Equal Protection Clause—a standard under which only "invidious discrimination" is forbidden—is best summarized in two cases: *Skinner v. Oklahoma*, 316 U.S. 535, (1959), and *McGowan v. Maryland*, 366 U.S. 420, (1960).

The *Skinner* Court said:

> "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry.' Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L.Ed. 539, 543, 34 S. Ct. 281. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience." (316 U.S. at 539-40)

The *McGowan* Court stated:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (366 U.S. at 425-26)

When we measure the contentions raised by Appellants against the standard set forth in *Skinner and McGowan*, it is apparent that they are so insubstantial that the case must fall. To recapitulate what we have said:

1. The record below reveals that there was no discrimination against Appellants on the instant facts, since all parties had an equivalent straight party lever.

2. There is no competent evidence in the record as to what effect, if any, the straight party lever has upon the psychology and conduct of voters in the voting machine. Even if this Court were to conclude, a priori, that the party lever has some effect and that it favors the major party candidates, there is no evidence as to how great that effect is or that it is substantial.

3. There are numerous factors justifying the straight party lever voting arrangement which are well within the scope of a State's discretion, such as expediting the voting process, facilitating the expression by a voter of his party preference, discouraging vote "roll-off," etc. These are described in detail above.

4. Even if the Court were to conclude that there is some slight advantage to the party candidates, there is clearly no "invidious discrimination."

In view of the foregoing, it is submitted that the conclusion of the Court below that Appellants had failed to sustain their burden of proving that the straight party lever causes "invidious discrimination" must be affirmed.

IV. THE COURT BELOW ACTED PROPERLY IN DISMISSING THE COMPLAINT.

Appellants' Complaint did not request any of the following: (1) injunctive relief beyond the November 4, 1969 Election; (2) relief under the Declaratory Judgment Act; (3) consideration of the record at the preliminary injunc-

tion hearing as on final hearing; (4) advancement of trial on the merits, and/or consolidation of it with the preliminary injunction hearing. Appellants could easily have requested (3) or (4) under Federal Rule 65 (a) (2) in the lower Court. It was not the Court's obligation to do it for them and it is too late for them to rely on Rule 65 (a) (2) on Appeal.

On the other hand, there was filed on behalf of Appellee City Commissioners, a Motion to Dismiss under Rule 12 of the Federal Rules of Civil Procedure. Although it did not expressly say so in its Opinion, it is submitted that the Court below, in dismissing the Complaint, can be construed to have acted on that Motion to Dismiss; or in light of the testimony, the Court might be construed to have treated the Motion as one for Summary Judgment under Federal Rule 56, granted it and dismissed on that ground.

In any event, in view of the failure of Appellants to request the four items just enumerated; in view of the testimony; and in view of the legal arguments set forth in the preceding section of the brief, it is submitted that the Court acted properly in dismissing Appellants' Complaint. To have proceeded with a trial after the Election, when the case was moot, even had there been a request to do so, could not have resulted in a different outcome.

CONCLUSION

Wherefore, Appellees respectfully submit that the case is moot; that a three-judge Court should never have been convened; and that the questions upon which this cause depend are so unsubstantial as not to need further argument. Appellees therefore respectfully move the Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered in the cause by the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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APPENDIX B
Summary of State Voting Laws*

State	Source	Straight Party Voting Permitted or Required	Straight Party Voting Not Permitted
Alabama	Code, Title 17 §§97, 159, 161, 193	X	
Alaska	Stats. (Michie), §§15.15.030, 360(1), 15.20.260		X
Arizona	Rev. Stats. Anno., §§16-793A, 8-441I	X	
Arkansas	Stats. Anno., §§3-832, 3-837, 3-1234, 3-4702	X	
California	West's Elec. Code, §§10228, 14412, 15014, 15028, 15711	X**	
Colorado	Rev. Stats., §§49-11-9, 49-15-10		X
Connecticut	Const., Art. VI, Sec. 5, Gen. Stats. Anno., §9-242	X	
Delaware	Code, Anno., Title 15, §§4940, 5002(3), 5008	X	
Florida	Stats. Anno., §§101.011, 101.191, 101.36		X
Georgia	Code, Anno., Title 34, §§1206, 1208, 1314(c), 1322(b), 1330(c)	X	
Hawaii	1968 Rev. Stats., §§11-55, 15-32		X
Idaho	Code, Vol. 6A, Title 34, §§904, 1011, 2401		X
Illinois	Smith-Hurd Anno. Stats., Ch. 46, §§17-11, 24-1, 24A-4, 24A-16(2), 24A-16(6)	X	
Indiana	Burns' Stats. Anno., §§29-5001, 29-5021, 29-5114, 29-5218(5)	X	
Iowa	Code Anno., §§49.42, 49.94, 49.97, 52.10	X	
Kansas	Stats. Anno., §§25-416, 25-602, 25-603a		X
Kentucky	Baldwin's Rev. Stats., §§118.280, 125.040(3), 125.060	X	
Louisiana	Rev. Stats., Title 18, §§671A(Supp.), 1168(3)	X	
Maine	Rev. Stats. Anno., Title 21, §§922, 1038	X	
Maryland	Code Anno., Art. 33, §§16-3, 16-5, 107(b)		X
Massachusetts	Gen. Laws Anno., ch. 54, §§33, 42, 77		X
Michigan	Compiled Laws Anno., §§6.1706 (Supp.), 6.1737(2), 168.775, 168.706	X	
Minnesota	Stats. Anno., §§203.30, 204(10)(a), 206.07(4), 206.07, 206.07(1), 206.185		

Missouri	Anno. Stats., §§111.580(1), 121.060 (3), 121.100	X	
Montana	Rev. Code, §§23-1210, 23-1603A		X
Nebraska	Election Laws, §§32-422, 32-451, 32-452, 32-4113		X
Nevada	Election Laws, §§293.293(1), 293.295, 293.473		X
New Hampshire	Election Laws, §§52.26, 59.27, 59.58	X	
New Jersey	Stats. Anno., Vol. 19, §§19:15-27, 19:48-1		X
New Mexico	Stats. Anno., §§3-3-13(D), 3-3-12(4), 3-4-2(H), 3-9-5(H)	X	
New York	McKinney's Election Laws (Vol. 17), §105, 241, 248		X
North Carolina	Gen. Stats., §175(1)(c)	X	
North Dakota	Century Code, §§16-12-05, 16-21-02		X
Ohio	Page's Code Anno., Title 35, §§3505.03, 3507.05, 3507.07		X
Oklahoma	Stats. Anno., Title 26, §§274, 371	X	
Oregon	Election Laws, §§250.110(6), 258(1)(h) & (j), 258(2)(b)		X
Pennsylvania	Purdon's Stats. Anno., Title 25, §§ 3007(b), 3055(c), 3063(b)	X	
Rhode Island	Gen. Laws, Title 17, §§19-3, 19-15	X	
South Carolina	Code, §§23-310, 23-404	X	
South Dakota	Election Laws, §§16.1105, 16.1203, 16.2204	X	
Tennessee	Election Laws, §§2-1220, 2-1502, 2-1507		X
Texas	Election Laws, §§6.05, 6.06, 7.14(2), (8)	X	
Utah	Election Laws, §§20-7-20, 20-7-21, 20-18-4	X	
Vermont	Election Laws, Title 17, §§1043, 1086	X	
Virginia	Code, §§24-245, 24-295, 24-318.3, 24-318.4		X
Washington	Rev. Code, Anno., §§29.30.080, 29.33.090		X
West Virginia	Code (Michie), §§3-4-8(2)(8), 3-6-5(2)	X	
Wisconsin	Stats. Anno., §§5.37(1), 6.22(b), 11.03(2)	X	
Wyoming	Stats., §§22-118.81, 22-118.84, 22-118.113, 22-118.145		X

It should be noted that there are numerous differences among the statutory provisions above cited which cannot be reflected in a short summary such as is here presented. The purpose of this appendix is to describe, in compendious form, the general shape of [illegible]

APPENDIX C

Use of Voting Machines*

State	Statewide use required	Used in majority of voting areas	Used in some voting areas	State	Statewide use required	Used in majority of voting areas	Used in some voting areas
Alabama		★		Montana			★
Alaska			★	Nevada			★
Arizona		★		New Hampshire			★
Arkansas			★	New Jersey		★	
California			★	New Mexico	★		
Colorado		★		New York	★		
Connecticut	★			North Carolina			★
Delaware	★			North Dakota			★
Florida		★		Ohio			★
Georgia			★	Oklahoma			★
Hawaii			★	Oregon			★
Illinois		★		Pennsylvania		★	
Indiana		★		Rhode Island	★		
Iowa			★	South Carolina			★
Kansas			★	South Dakota		★	
Kentucky	★			Tennessee		★	
Louisiana	★			Texas		★	
Maine			★	Vermont			★
Maryland	★			Virginia			★
Massachusetts			★	Washington		★	
Michigan		★		West Virgina			★
Minnesota			★	Wisconsin			★
Mississippi			★	Wyoming			★
Missouri			★				

* Replies received in a survey conducted by the Council of State Governments indicate that voting machines are not used in Idaho, Nebraska, Puerto Rico, Utah and the Virgin Islands.

Source: Book of the States, 1968-69, published by Council of State Governments, Chicago, Ill.